Darshan Singh Khaira v Majlis Peguam Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-72–09 OF 2019(W)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA) AND HARMINDAR SINGH FCJ
13 AUGUST 2021

Legal Profession — Practice of law — What amounted to 'practising as a lawyer' — Appellant lawyer's practising certificate was suspended when he was adjudged bankrupt — Lawyer drafted documents for litigant to use for his case in court and advised him on the appeal procedures — Litigant represented himself at all times in court — Litigant paid fees and disbursements for advice and assistance received though not directly to appellant but to a law firm — Disciplinary board ('DB') struck appellant off Roll of advocates and solicitors for misconduct of practising law without a PC — Whether High Court and Court of Appeal were right to uphold DB's decision — Whether advice given/work done by appellant for litigant was what a solicitor would normally do for client based on relationship of confidence and trust — Whether finding that one had 'practised law' was not dependent on whether advice given/work done was in return for reward/fees — Whether one could equally commit misconduct of practising law without PC even if advice given or work done was rendered pro bono

The question in the instant appeal was whether the appellant, an advocate and solicitor, had 'practised law' when he gave legal advice and drafted documentation for court use for a litigant during the period when the appellant was an undischarged bankrupt and therefore disentitled from holding a practising certificate ('PC') under the Legal Profession Act 1976 ('the LPA'). The litigant ('Zulkefli') was involved in a matter in the magistrate's court when he sought help from the appellant who was then adjudged a bankrupt. The appellant drafted written submissions for Zulkefli's use in the magistrate's court and thereafter helped him with his appeals in the High Court and the Court of Appeal ('COA'). In the court proceedings at all levels, Zulkefli represented himself. In return for the appellant's assistance, Zulkefli paid legal fees and disbursements, not directly to the appellant but to the law firm of Messrs Darshan Singh & Co. When the COA struck out Zulkefli's appeal on the ground that prior leave to appeal had not been obtained, Zulkefli lodged a complaint against the appellant with the bar council. The disciplinary committee ('DC') under the LPA, which heard the complaint, found the appellant guilty of practising law without a PC and recommended that he be struck off the Roll of advocates and solicitors of the High Court of Malaya. The disciplinary board ('DB') agreed and ordered the appellant to be struck off. In his appeal to the High Court against the DB's decision, the appellant argued

that, inter alia: (a) it was never proven that he had practised law while he was a bankrupt; (b) he himself had never collected any fees from Zulkefli for the advice/assistance given; and (c) the law did not prohibit a layman from advising or assisting a litigant in his case. Based on the DC's factual findings, the High Court held that the appellant had practised law when he was a bankrupt and that in doing so had breached the provisions of the LPA. His appeal was accordingly dismissed. The COA affirmed the decision and held that when legal advice was given in return for reward or payment of fees, as in the instant case, it would most certainly amount to 'practising law'. In his instant appeal, the appellant argued that 'practising law' was an act that was 'systematic, regular and continuous' and could not include an isolated act of giving legal advice, more so when the giver of the advice did not personally receive any reward for doing so.

Held, unanimously dismissing the appeal and affirming the decisions of the courts below:

(1) Even a single or isolated act could amount to acting as an advocate and solicitor. It was not so much whether it was a single or isolated act of giving of advice but rather whether the impugned act or acts was what a lawyer usually did in carrying out his functions and duties as an advocate and solicitor (see para 20).

(2) Although the appellant was an 'unauthorised person' (see s 36 of the LPA), as he was suspended from practising law on account of his bankruptcy, he not only actively advised Zulkefli on the procedures applicable in the COA but also prepared the documents for the appellant to file in the COA. The said advice and documents were directly relevant to Zulkefli's rights and were tailored to meet his particular needs. In drafting and preparing the documents needed for Zulkefli's appeal, the appellant provided a service which went beyond mechanical or clerical tasks and was of a kind required to be performed by a solicitor as a layman's knowledge in such matters would be wholly inadequate. By actively advising Zulkefli on his appeal and preparing the necessary documentation, the appellant was plainly doing something which was usually done by a solicitor and he did it in such a way as to justify the reasonable inference that the person doing it was a solicitor. The legal advice and the documents prepared required the expertise of a legally-trained mind. In short, the appellant did what a lawyer would do when a client came for advice. It was intended that Zulkefli would act on the legal advice given. There existed quite plainly a relationship of confidence and trust between the appellant and Zulkefli which was an essential of legal practice. It was not a case where some legal advice was given casually or informally and, importantly, was lacking the necessary setting and status of a solicitor dealing with a client. The courts below were therefore justified in concluding that the appellant was practising

law at the material time and that his conduct violated the LPA as he was a bankrupt who had not obtained the consent of the bar council to practise law (see paras 16, 25–26 & 29–31).

(3) The appellant's argument that in order to constitute 'practising law' the giving of legal advice must be coupled with the receiving of fees or reward was not an acceptable proposition of law. Payment or receipt of fees or reward was not a pre-requisite to a finding that a person had engaged in legal practice. It would not make any difference if the appellant was not paid for the work done. As it turned out, however, the services provided by the appellant were not without payment. The payment was made to the firm of M/s Darshan Singh & Co by Zulkefli. Hence, the appellant's arguments in this context had no merit (see paras 34 & 37).

(4) The issue of whether the punishment of being struck off the Roll was harsh and disproportionate to the appellant's conduct was not raised in the courts below. At any rate, this court considered the punishment justified as the appellant was found guilty of the serious misconduct of practising law when he knew that he was disqualified from doing so (see para 38).

(5) The court declined to answer the leave question as to do so would require the court to demarcate or define the nature of legal advice that would constitute 'practising law'. A lot would depend on the contextual facts and circumstances of the case (see para 40).

[Bahasa Malaysia summary

Persoalan dalam rayuan semasa adalah sama ada perayu, seorang peguambela dan peguamcara, telah 'mengamal undang-undang' apabila beliau memberikan nasihat undang-undang dan menyediakan dokumen untuk kegunaan mahkamah bagi seorang penuntut selama tempoh ketika perayu adalah bankrap yang belum dilepaskan dan oleh itu tidak berhak untuk memegang sijil amalan guaman ('PC') di bawah Akta Profesion Undang-Undang 1976 ('APU'). Pengadu ('Zulkefli') terlibat dalam suatu perkara di mahkamah majistret apabila beliau meminta bantuan dari perayu yang kemudian yang diisytihar sebagai muflis. Pengadu menyediakan hujahan bertulis untuk kegunaan Zulkefli di mahkamah majistret dan setelah itu membantu beliau dengan rayuannya di Mahkamah Tinggi dan Mahkamah Rayuan ('MR'). Dalam prosiding mahkamah di semua peringkat, Zulkefli mewakili dirinya. Sebagai balasan atas bantuan perayu, Zulkefli membayar fi perundangan dan perbelanjaan, bukan secara terus kepada perayu tetapi kepada firma guaman Tetuan Darshan Singh & Co. Apabila MR membatalkan rayuan Zulkefli atas alasan bahawa kebenaran terdahulu untuk merayu tidak diperoleh, Zulkefli telah membuat aduan terhadap perayu kepada majlis peguam. Jawatankuasa Tatatertib ('JT') di bawah APU, yang mendengar aduan tersebut, mendapati perayu bersalah kerana mengamalkan

undang-undang tanpa PC dan mengesyorkan agar beliau dilucutkan dari senarai peguambela dan peguamcara Mahkamah Tinggi Malaya. Lembaga disiplin ('DB') bersetuju dan memerintahkan agar perayu dilucutkan. Dalam rayuannya ke Mahkamah Tinggi terhadap keputusan DB, perayu berpendapat bahawa, antara lain: (a) ia tidak pernah dibuktikan bahawa beliau telah mengamalkan undang-undang semasa beliau muflis; (b) beliau sendiri tidak pernah mengambil sebarang fi dari Zulkefli untuk nasihat/bantuan yang diberikan; dan (c) undang-undang tidak melarang orang awam dalam menasihati atau membantu pengadu dalam kesnya. Berdasarkan dapatan fakta JT, Mahkamah Tinggi memutuskan bahawa perayu telah mengamalkan undang-undang ketika beliau muflis dan bahawa dengan berbuat demikian telah melanggar peruntukan APU. Oleh itu, rayuannya telah ditolak. MR mengekalkan keputusan tersebut dan memutuskan bahawa apabila nasihat undang-undang diberikan dengan balasan untuk ganjaran atau pembayaran fi, seperti dalam kes semasa, ianya pasti terjumlah kepada 'mengamal undang-undang'. Dalam rayuan semasa beliau, perayu berpendapat bahawa 'mengamal undang-undang' adalah tindakan yang 'sistematik, berkala dan berterusan' dan tidak boleh termasuk tindakan terpencil dalam memberikan nasihat undang-undang, lebih-lebih lagi apabila pemberi nasihat tidak secara peribadi menerima ganjaran kerana melakukannya.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan mahkamah di bawah:

(1) Meskipun suatu tindakan tunggal atau terpencil boleh terjumlah sebagai bertindak sebagai peguambela dan peguamcara. Ianya bukan sama ada suatu tindakan tunggal atau terpencil dalam memberi nasihat tetapi sama ada tindakan yang dipersoal tersebut adalah apa yang biasanya dilakukan oleh seorang peguam dalam menjalankan fungsi dan tugasnya sebagai peguambela dan peguamcara (lihat perenggan 20).

(2) Walaupun perayu adalah 'orang tidak diberi kuasa' (lihat s 36 APU), kerana beliau digantung daripada mengamal undang-undang atas alasan beliau muflis, beliau bukan sahaja secara aktif menasihati Zulkefli mengenai prosedur yang terpakai dalam MR tetapi juga menyediakan dokumennya untuk perayu memfailkan dalam MR. Nasihat dan dokumen tersebut berkaitan secara langsung dengan hak Zulkefli dan disesuaikan untuk memenuhi keperluannya. Dalam menyediakan dan menyiapkan dokumen yang diperlukan untuk rayuan Zulkefli, perayu memberikan perkhidmatan yang melampaui tugas mekanikal atau perkeranian dan yang perlu dilakukan oleh seorang peguam kerana pengetahuan orang awam dalam hal-hal seperti itu sama sekali tidak mencukupi. Dengan secara aktif menasihati Zulkefli mengenai rayuannya dan menyiapkan dokumen yang diperlukan, perayu dengan jelas melakukan sesuatu yang biasanya dilakukan oleh peguamcara dan beliau melakukannya sedemikian rupa bagi membenarkan kesimpulan

yang munasabah bahawa orang yang melakukannya adalah peguamcara. Nasihat undang-undang dan dokumen yang disediakan memerlukan kepakaran dari seorang yang terlatih dalam pengetahuan undang-undang. Pendek kata, perayu melakukan apa yang akan dilakukan oleh peguam apabila anak guam datang untuk mendapatkan nasihat. Ia adalah bertujuan agar Zulkefli bertindak berdasarkan nasihat undang-undang yang diberikan. Jelas wujudnya hubungan keyakinan dan kepercayaan antara perayu dan Zulkefli yang merupakan asas amalan undang-undang. Ini bukan suatu kes di mana nasihat undang-undang diberikan secara santai atau tidak formal dan, yang penting, terdapat kekurangan aturan dan status peguamcara yang berurusan dengan anak guam. Oleh itu, mahkamah di bawah ini mempunyai justifikasi dalam memutuskan bahawa perayu mengamalkan undang-undang pada masa material dan bahawa tindakannya melanggar APU kerana beliau seorang bankrap yang tidak mendapat kebenaran majlis peguam untuk mengamalkan undang-undang (lihat perenggan 16, 25–26 & 29–31).

(3) Hujahan perayu bahawa bagi membuktikan 'mengamal undang-undang' pemberian nasihat undang-undang harus digabungkan dengan penerimaan fi atau ganjaran bukanlah usul undang-undang yang dapat diterima pakai. Pembayaran atau penerimaan fi atau ganjaran bukanlah pra-syarat dalam dapatan bahawa seseorang telah menjalankan amalan undang-undang. Ia tidak memberikan sebarang perbezaan sekiranya perayu tidak dibayar bagi pekerjaan yang dilakukan. Namun, ternyata, perkhidmatan yang diberikan oleh perayu bukanlah tanpa bayaran. Pembayaran dibuat kepada firma Tetuan Darshan Singh & Co oleh Zulkefli. Oleh itu, hujah perayu dalam konteks ini tidak mempunyai merit (lihat perenggan 34 & 37).

(4) Isu mengenai sama ada hukuman dilucutkan dari senarai adalah keras dan tidak berkadaran dengan tingkah laku perayu tidak dibangkitkan di mahkamah di bawah. Bagaimanapun, mahkamah ini menganggap hukuman tersebut dibenarkan kerana perayu didapati bersalah atas salah laku serius dalam mengamalkan undang-undang apabila beliau mengetahui bahawa beliau hilang kelayakan dari melakukannya (lihat perenggan 38).

(5) Mahkamah menolak untuk menjawab persoalan kebenaran kerana dengan berbuat demikian akan meminta mahkamah untuk mengehadkan atau menentukan sifat nasihat undang-undang yang akan membuktikan 'mengamal undang-undang'. Sebilangan besar akan bergantung pada fakta mengikut konteks dan keadaan kes (lihat perenggan 40).]

Cases referred to

Australian Competition & Consumer Commission v Murray [2002] FCA 1252, FC (refd)
Chan Chow Wang v Malaysian Bar [1986] 2 MLJ 159 (refd)
Charan Jit Singh a/l Santokh Singh v Majlis Peguam Malaysia & Anor [2013] 9 MLJ 400, HC (refd)
Cornall v Nagle [1995] 2 VR 188, SC (refd)
Darshan Singh Khaira v Zulkefli bin Hashim (Majlis Peguam Malaysia, pencelah) [2020] MLJU 339, CA (refd)
Legal Practice Board v Adams [2001] WASC 78, SC (refd)
Legal Services Commissioner v Walter [2011] QSC 132, SC (refd)
New York County Lawyers' Association v Dacey 28 AD 2d 161 (1967), SC (refd)
Sanderson, Re; ex parte Law Institute of Victoria; sub nom Law Institute of Victoria v Sanderson [1927] VLR 394, SC (refd)
Teoh Hooi Leong v Bar Council, Malaysia [1991] 2 MLJ 190, SC (refd)
Thavananthan a/l Balasubramaniam v Majlis Peguam Negara [2010] 3 MLJ 316, FC (refd)

Legislation referred to

Legal Profession Act 1976 ss 29(2)(b), 35, 36, 37, 38, 38(1)(m), 107, Part IV

Appeal from: Civil Appeal No W-02(A)-306–02 of 2018 (Court of Appeal, Putrajaya)

Darshan Singh Khaira representing himself.
Oh Teik Keng (Oh Teik Keng & Partners) for the respondent.

Harmindar Singh FCJ (delivering judgment of the court):

[1] This appeal concerns an issue of some importance to the legal profession. The question for our consideration is simply this: under what circumstances can it be said that a person is practicing law. Can someone who has given some legal advice informally be said to have practiced law? Can an isolated act of giving advice constitute practising law or must it require a systematic, regular and continuous act? Or does it require something more in the form of a solicitor-client status requiring a relationship of trust and confidence?

[2] The appellant, Darshan Singh Khaira, was a practising lawyer for many years. However, by a decision of the disciplinary board ('DB') of the Majlis Peguam Malaysia dated 14 April 2016, he was struck off the Roll of advocates and solicitors of the High Court of Malaya. The basis for the said order was that the appellant was practising law without a practising certificate as he was a bankrupt.

[3] The appellant then filed an originating summons in the High Court at Kuala Lumpur to set aside the said order of the DB of the Majlis Peguam Malaysia. The High Court dismissed his application. He then filed an appeal to the Court of Appeal. He failed again. He was, however, successful in obtaining leave of this court to file an appeal on a single question of law as follows:

> Whether the giving of advice to a client of a law firm amounts to practising as a lawyer

THE BACKGROUND

[4] In order to appreciate how the appellant came to the predicament of being struck off the Roll, it is necessary to set out the relevant facts. It transpired that the appellant had assisted the complainant, Zulkefli bin Hashim, in a traffic case in the magistrate's court in Georgetown and later in proceedings before the High Court and Court of Appeal. Although the complainant had represented himself in these proceedings, he had engaged the appellant to prepare the legal documentation and had sought legal advice from him. When the Court of Appeal had struck out his appeal on a procedural ground in that prior leave to appeal had not been obtained, the complainant lodged a complaint with the Majlis Peguam Malaysia.

[5] The complaint was heard by the disciplinary committee ('DC') on 27 January 2015 and 15 January 2016. At the end of the hearing, the DC made the finding that the appellant had committed a serious misconduct by providing legal advice to the complainant at the relevant time between 22 August 2007 to 15 January 2009 when he was an undischarged bankrupt and did not hold a valid practicing certificate. The DC recommended that the appellant be struck off the Roll of advocates and solicitors of the High Court of Malaya. This recommendation was accepted by the DB and by an order dated 14 April 2016, the appellant was duly struck off the Roll of advocates and solicitors of the High Court of Malaya.

PROCEEDINGS IN THE COURTS BELOW

[6] At the High Court, the appellant raised various grounds to set aside the order of the DB of the Majlis Peguam Malaysia. The only ground which was relevant to the appeal before us was that the charge of misconduct was not proved against the appellant as he had never practiced law during the bankruptcy order. The appellant took the position that any layman can give advice and assist a litigant. Further, no fees were collected by the appellant himself as all fees and disbursements were paid to the firm of Messrs Darshan Singh & Co for prior work done.

[7] In this respect, however, the High Court particularly noted the findings of fact made by the DC: A

(a) that the appellant had advised the complainant on the appeal procedure from the magistrate's court to the High Court and from the High Court to the Court of Appeal; and B

(b) that the appellant had procured legal fees and disbursement from the complainant in his professional capacity as a practicing advocate and solicitor, as can be seen from the receipts dated 6 August 2007, 18 August 2007 and 14 February 2008. C

[8] The High Court went on to hold (at para 24):

> [24] In the present case, when the appellant was adjudged a bankrupt on 22 August 2007, his practicing certificate was automatically suspended and he cannot practice without the consent of the bar council. Therefore, based on the evidence before the DC and the admission of the appellant himself that he had advised the complainant on the appeal process when he did not hold a valid practicing certificate, the appellant had acted against s 29(2)(a) of the LPA 1976. D

[9] Now, the appellant also argued that as a lay person, there was nothing wrong for him to give legal advice and also that merely advising a party is not practicing law. This contention by the appellant was, however, not accepted by the High Court. Relying on the Australian case of *Legal Services Commissioner v Walter* [2011] QSC 132 ('Walter'), the High Court held that based on the evidence, all the acts of the appellant can be said to lie at or near the very centre of the practice of law, and hence amount to practicing law. Added to that was the fact that the appellant was paid for the legal services that he had rendered. E F

[10] On appeal to the Court of Appeal, the appellant raised, among others, the same issue in that the mere giving of legal advice cannot amount to practicing law. The Court of Appeal, however, relied on *Walter*'s case, and held that the appellant was giving legal advice for reward although he himself did not receive the fees. The following is how the court put it: G

> [18] As found by the learned High Court judge, the appellant had admitted that the 'yuran guaman dated 18 August 2007 and 6 August 2007' were payment for the drafting of the written submission in the magistrates' court, while the receipt dated 4 March 2011 was for the outstanding fees for the High Court matter. This shows that the appellant was giving legal advice for reward and this can be said 'to lie at or near the very centre of the practice of law' and hence amount to practising law. Although we agree that mere giving of advice would not tantamount to practising law, but the giving of advice for fees or reward would definitely bring to that conclusion. H I

[11] Needless to add, the appellant again failed on this issue and his appeal was accordingly dismissed.

THE INSTANT APPEAL

[12] Seemingly undeterred, the appellant successfully obtained leave to appeal to this court. The issue for our determination, following from the single leave question, was whether the giving of advice to a client of a law firm amounts to practicing as a lawyer. Allied to this issue, as raised by the respondent, is also the question of whether payment is necessary before the giving of advice becomes legal practice. If that is indeed the case, an issue which must follow is whether payment must be received by the person giving the assistance, before that assistance becomes legal advice.

[13] Now, it must be noted at the outset that an undischarged bankrupt cannot practice law without the consent of the bar council. This is provided under s 29(2)(b) of the Legal Profession Act 1976 ('the LPA 1976') which reads:

> 29 Advocate and solicitor to make declaration yearly
>
> (1) ...
>
> (2) Subject to sub-s (3), every practising certificate shall be signed by the registrar and shall be valid from the date of issue to the end of the year:
>
> Provided that —
>
> (a) ...
>
> (b) where an advocate and solicitor is adjudicated a bankrupt or a receiving order is made against him, the practising certificate, if any, of that advocate and solicitor shall be suspended forthwith, until the consent of the bar council to reinstate it is obtained.

[14] It must follow that when the appellant was adjudged a bankrupt on 22 August 2007, his practising certificate was automatically suspended and he could not practice without the consent of the bar council. The evidence before the DC, however, disclosed that the appellant had given legal advice to the complainant when he did not have a valid practicing certificate. He had also procured legal fees and disbursements from the complainant as evidenced by the receipts issued. By his own admissions to the DB, he would have *ex hypothesi* acted in breach of s 29(2)(b) of the LPA 1976.

[15] As he had done before the courts below, the appellant maintained before us that as a lay person, there was nothing wrong for him to give legal advice. Any lay person could give legal advice and assist a litigant. In short, he argued that merely advising a party is not practicing law. He also claimed that he did

not collect the legal fees for himself as they were paid to the legal firm of M/s Darshan Singh & Co for work done by him.

[16] In order to contemplate upon these assertions by the appellant, it is pertinent to observe at the outset that there is no inherent right to practice law. It is only an advocate and solicitor who is given certain privileges which attach to his profession under Part IV of the LPA 1976. So, for example, under s 35 of the LPA 1976, an advocate and solicitor has the exclusive right to appear and plead in all courts of justice. The only condition is that he/she must have his/her name on the Roll and have a valid practicing certificate. Any person who is not so qualified is deemed to be an 'unauthorized person' (see s 36 of the LPA 1976). So, an unauthorized person who acts as an advocate and solicitor commits an offence (see s 37 of the LPA 1976). Section 38 of the LPA 1976, however, provides some exceptions to acting as an advocate and solicitor, for example, a full-time employee of the advocate and solicitor can draw up and prepare documents (see s 38(1)(m)).

[17] Although the LPA 1976 is instructive as to the types of conduct which are within the exclusive domain of advocates and solicitors, the statute does not provide any determinative test as to what amounts to practicing as an advocate and solicitor in all other cases. We should also add, lest it is carried too far, that although the LPA 1976 itself describes these functions as the privilege of advocates and solicitors, implicit within the provisions is the need to protect the public against persons who, although being without the necessary qualifications and competence of an advocate and solicitor, may purport to provide such services which may clearly be outside their competence to the detriment of unsuspecting members of the public. The penalties that will be visited upon such 'unauthorised persons' is testament of the policy reasons behind such protection. After all, an advocate and solicitor has the necessary educational qualifications and training and is required, as a prerequisite, to be of good character. Importantly as well, an advocate and solicitor will be subject to discipline if he/she falls short of the prescribed standards under the law.

[18] Be that as it may, the present appeal presents quite a different state of circumstances. It is not about a lay person holding himself out to be an advocate and solicitor. The appellant here has become an unqualified person by virtue of being suspended from practice. He may have been fully competent in going about his profession as an advocate and solicitor but he is prohibited from doing so by law when he became a bankrupt.

[19] The appellant nevertheless contends that isolated acts of giving advice can never constitute practising law. Practising law, he says, requires a systematic, regular and continuous act. He submitted that isolated acts of advice do not require a practising certificate and cannot amount to professional

misconduct. He is saying, in effect, as he is probably compelled to do, that he was not engaging in legal practice when he assisted the complainant.

[20] With respect, we do not agree. In our view, even a single or isolated act can amount to acting as an advocate and solicitor. It is not so much a single or isolated piece of advice but rather whether the impugned act or acts is what a lawyer usually does in carrying out his functions and duties as an advocate and solicitor.

[21] There are a dearth of precedents in this area of the law in Malaysia. The Australian courts, however, have had the opportunity to deal with such matters in some cases. In *Cornall v Nagle* [1995] 2 VR 188, JD Phillips J of the Supreme Court of Victoria endorsed the *Sanderson* test laid down in *Re Sanderson; ex parte Law Institute of Victoria; sub nom Law Institute of Victoria v Sanderson* [1927] VLR 394, in which Cussen J set out the following practical test of whether a person has engaged in legal practice:

> If a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor — if he combines professing to be a solicitor with action usually taken by a solicitor — I think he then does act as a solicitor.

[22] The three ways in which a person could be said to be practising as a solicitor was summarised by the court as follows:

> Based upon the foregoing, I conclude that a person who is neither admitted to practise nor enrolled as a barrister and solicitor may 'act or practise as a solicitor' in any of the following ways:
>
> (1) by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. This is the test in *Sanderson*.
>
> (2) by doing something that is positively proscribed by the Act or by rules of court unless done by a duly qualified legal practitioner. Examples of such prohibitions in a statute are s 93 and s 111 of the LPPA (Legal Profession Practice Act 1958).
>
> (3) by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.

[23] In conclusion, JD Phillips J observed:

> In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of the law, and hence of the notion of acting or practising as a solicitor, which is itself central to s 90. If the public is to be adequately protected from those lacking relevant qualifications, then, in the context of a regulated legal profession, the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise. It is thus something required to be undertaken only by the legally qualified, and not by those not properly qualified.

[24] In *Walter*'s case, a case relied upon by the courts below, the Supreme Court of Queensland had to contend with an application for an injunction to restrain the defendant, who was not an Australian legal practitioner, from engaging in legal practice in the state of Queensland. The court had to ascertain whether the impugned conduct of the defendant amounted to a person carrying on or exercising the profession of law, and had thereby practiced law. In allowing the application and finding that the defendant had practiced law, Daubney J alluded to each of the following matters which can be said to lie near the very centre of the practice of litigation law:

(a) advising parties to litigation in respect of matters of law and procedure;

(b) assisting parties to litigation in the preparation of cases for litigation;

(c) drafting court documents on behalf of parties to litigation;

(d) drafting legal correspondence on behalf of parties to litigation; and

(e) purporting to act as a party's agent in at least one piece of litigation.

[25] On our part, we find no reason to think that the matters listed above are not matters which lie at the heart of the practice of law. So, in the present case, although being an 'unauthorized person' as he was suspended from practice, the appellant not only actively advised the complainant on the procedures applicable in the Court of Appeal but also prepared the documents for the appellant to file in the Court of Appeal. The said advice and documents were directly relevant to the complainant's rights and were tailored to meet the particular needs of the complainant (see *Australian Competition & Consumer Commission v Murray* [2002] FCA 1252).

[26] In drafting and preparing the documents needed for the complainant's appeal, the appellant provided a service which went beyond mechanical or clerical tasks and was of a kind required to be performed by a solicitor as the knowledge of the layman in these matters would be wholly inadequate. In *Legal Practice Board v Adams* [2001] WASC 78, a case before the Supreme Court of Western Australia, the defendant faced a charge of contempt for acting as a solicitor when he was not a duly certified legal practitioner. He had drawn up various documents relating to legal practice. His defence was that he was acting

more in a clerical capacity than as a solicitor.

[27] In coming to his decision, Hasluck J accepted that the practice of law 'includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court'.

[28] In finding the defendant guilty of contempt, Hasluck J observed:

> If the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of the law ... [W]here an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others, more than the knowledge of the layman is required. A charge for such service brings it definitely within the term 'practice of the law'.

[29] In the circumstances, we did not think, as the appellant had asserted, that he was merely giving legal advice and assisting the litigant as any lay person would. By actively advising the complainant on his appeal and preparing the necessary documents, the appellant was plainly doing something which is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. The legal advice and the documents to be prepared required the expertise of a legally trained mind. Although legal clerks also prepare such documents, they do so with the supervision and approval of the solicitor.

[30] Put simply, the appellant was doing, as the evidence disclosed, what a lawyer does when a client comes for advice and it was intended for the complainant to act on the legal advice provided. In our view, there existed quite plainly a relationship of confidence and trust between the appellant and the complainant which is an essential of legal practice (see *New York County Lawyers' Association v Dacey* 28 AD 2d 161 (1967)). It was not a case where some legal advice was given casually or informally and importantly, lacking the necessary setting and status of a solicitor dealing with a client.

[31] For all the preceding reasons, we were in agreement that the courts below were justified in concluding that the appellant was involved in the

practice of law. His conduct was in violation of the LPA 1976 as he was a bankrupt who had not obtained the consent of the bar council to practise law.

[32] Now, that should be sufficient to dispose of this appeal. However, there is still outstanding an issue which was raised by the appellant which appeared to be accepted by the Court of Appeal. The appellant claimed that he did not collect the legal fees for himself as they were paid to the legal firm of M/s Darshan Singh & Co for work done. In other words, the non-collection of fees for himself, it was submitted, was decisive in establishing in his favour the issue of whether he was practicing law. Much of the confusion arose from the following conclusion by the Court of Appeal, as was set out earlier, and as reported in *Darshan Singh Khaira v Zulkefli bin Hashim (Majlis Peguam Malaysia, pencelah)* [2020] MLJU 339 at para [18]:

> ... This shows that the appellant was giving legal advice for reward and this can be said 'to lie at or near the very centre of the practice of law' and hence amount to practising law. Although we agree that mere giving of advice would not tantamount to practising law, but the giving of advice for fees or reward would definitely bring to that conclusion.

[33] This passage suggests as asserted by learned counsel by the respondent that the mere giving of advice without reward cannot amount to practicing law. In other words, the giving of legal advice must be coupled with receiving fees or reward before it can be said that one is practicing law.

[34] We must say at once that if that was what was intended by that passage, it was most unfortunate and is certainly not an acceptable proposition of law. To be fair, some of the confusion may have arisen because of the reference to 'reward' in some of the precedents referred to by the Court of Appeal which we will deal with shortly. In our judgment, the more reasonable proposition is that any payment or receipt of fees or reward is not a pre-requisite to a finding that a person has engaged in legal practice. However, if such fees or reward is received, then it is more likely that a person may be deemed to have been practicing law.

[35] If this was not the case, it would turn out to be quite a remarkable circumstance for a lawyer following from his suspension as an advocate and solicitor to continue to advise clients and even appear in court on their behalf with the excuse that he cannot be said to be practising law because he is acting pro bono or without reward. In our respectful view, any such solicitor, if he/she had acted as such, would be in breach of the LPA 1967.

[36] Now, the Court of Appeal was very much influenced by a passage purportedly in *Walter*'s case, where it was observed that the giving of legal advice, at least as part of a course of conduct and for reward, can properly be

said to lie at or near the very centre of the practice of law. With respect, this passage ought to be attributed to JD Phillips J's pronouncement in *Cornall v Nagle*. Be that as it may, Daubney J in *Walter*'s case clarified the position as follows:

> [21] In short, the fact that a person is engaged in the business of providing legal services is indicative of that person practising law, but a person may be practising law without being in business. It is clear, for example, that an Australian legal practitioner can exercise the profession of law for clients without any entitlement to or expectation of reward or remuneration from those clients. But an Australian legal practitioner who habitually acts pro bono for needy clients can hardly be said to be not engaged in legal practice because he or she provides professional legal services without reward from those clients.

[37] Returning to the instant appeal, and in view of what we have observed, it must follow that it would not make any difference if the appellant did not receive payment for the work done. As we had pointed out, giving legal advice for reward is not a pre-requisite for a finding of practicing law. In any case, as it turned out, the services provided by the appellant were not without payment. Payment was indeed made to the firm of M/s Darshan Singh & Co by the complainant. So, for the reasons we have mentioned, the appellant's arguments in this context were without merit.

[38] Finally, we come to the issue of whether the punishment of being struck off the Roll was disproportionate to the conduct of the appellant. The appellant claimed it was harsh and totally disproportionate. He had not raised this issue in the courts below and we did not therefore have the benefit of a prior consideration of this issue before us. At any rate, we did not consider the punishment to be disproportionate. The appellant was certainly guilty of serious misconduct when he continued to practice law when he knew he was disqualified from doing so. So, we think the punishment was justified.

[39] Be that as it may, it is pertinent to observe that the punishment of being struck off the Roll may not mean the end of a career as an advocate and solicitor. An advocate and solicitor who has been struck off can apply for reinstatement under s 107 of the LPA 1967. He/she will have to satisfy the court that it would be fair and reasonable to restore the said advocate and solicitor to the Roll based on the criteria settled in decided cases (see *Charan Jit Singh a/l Santokh Singh v Majlis Peguam Malaysia & Anor* [2013] 9 MLJ 400; *Teoh Hooi Leong v Bar Council, Malaysia* [1991] 2 MLJ 190; *Chan Chow Wang v Malaysian Bar* [1986] 2 MLJ 159; and *Thavananthan a/l Balasubramaniam v Majlis Peguam Negara* [2010] 3 MLJ 316).

CONCLUSION

[40] In conclusion, and for the reasons mentioned, we did not find any merit in the issues raised by the appellant. The courts below were entitled to come to the findings on the core issues as they did subject to our observations as expressed in paras [32] to [37] above. On the question of law posed before us, we considered that it would require this court to demarcate or define the nature of legal advice which would constitute 'practicing law'. Although we have endeavored to set out the law in relation to the leave question but, as the cases show, a lot depends upon the contextual facts and circumstances. We therefore decline to answer the question.

[41] In the circumstances, the appeal is dismissed with no order as to costs. The orders made by the courts below are hereby affirmed.

Appeal dismissed.

Reported by Ashok Kumar